PP v. BONADVENTURE CHINENDU OKORO

HIGH COURT MALAYA, SHAH ALAM
ZULKIFLI BAKAR J
[CRIMINAL TRIAL NO: 45A-86-09-2014]
31 MAY 2016

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 837.9g of methamphetamine – Drugs discovered in bag carried by accused – Defence of innocent carrier – Whether established – Whether accused had knowledge of drugs inside bag – Whether there was discrepancy in chemist's analysis of drugs – Incomplete investigation – Whether detrimental to prosecution's case – Whether accused succeeded in rebutting statutory presumption of trafficking under s. 37(da)(xvi)*

The accused, a Nigerian, was charged for trafficking in 837.9g of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The facts revealed that the accused was found carrying the dangerous drugs inside his luggage bag ('the bag') at the Kuala Lumpur International Airport. Inside the bag, the raiding officer ('PW4') found, among others, four packages containing macaroni while another four packages contained one transparent plastic bag which contained crystalline substances. Upon examination, the chemist ('PW5') confirmed that the incriminating substances in the transparent plastic bags were the dangerous drugs, methamphetamine. *Vide* his defence, the accused claimed that he came to Malaysia to survey about motorcycle spare parts since he was involved in the said business in Nigeria. According to the accused, his friend, one Ejike Chukwuebuka ('Ejike') informed him that his elder brother, Udo Chukwuebuka ('Udo'), was involved in motorcycle business in Malaysia and he could assist the accused whilst he was here. Relying on the defence of innocent carrier, the accused submitted that Ejike had handed over the bag to the accused which was supposed to be given to Udo in Malaysia. The accused admitted that he opened the bag and saw, among others, some personal items such as clothes and red colour plastic packages printed with the words "GOLDEN PENNY ELICHE" which contained macaroni. The accused denied that he had knowledge of the drugs and challenged PW5's evidence by asserting that there was material discrepancy in relation to the representative samples taken by PW5 for analysis. It was further argued, *inter alia*, that (i) there was insufficient evidence to show that PW5 had followed the standard operation procedure whilst performing the analysis on the drugs; and (ii) the investigating officer failed to investigate Ejike and Udo. Among the issues that arose for determination was whether the defence had rebutted the statutory presumption of trafficking and cast a reasonable doubt on the prosecution's case.

Held (acquitting and discharging accused):

(1) There was no issue in relation to the mishandling or irregularity in the process of analysis and what PW5 did was in compliance with the law. PW5's evidence was accepted as a part of *prima facie* evidence of the prosecution and there was no necessity for PW5 to show the laboratory procedures in detail because his evidence was not inherently incredible to be believed. Further, there was no break in the chain of evidence in respect of the identity of the drugs. Since there was no reasonable reason to disbelieve his evidence, the evidence of PW5 on its face value was accepted. (paras 15, 18, 20 & 21)

(2) The eight packages were not transparent for the contents to be visible. Hence, the defence of innocent carrier became probable in the circumstances of this case. It was unfair to equate the accused with PW4 since the latter was a well-trained and an experienced enforcement officer with necessary skills whilst the accused was just a layman without the same skills and experience as possessed by PW4. The accused would not have known that the incriminating substances were placed inside the sealed packages since their contents could not be seen from outside. In the circumstances, the accused's defence of an innocent carrier was accepted. (paras 43-45)

(3) The accused had given the name of the person who had allegedly passed the bag to him and the name of the person for him to pass the bag. The investigating officer should have taken some steps to investigate and obtain the details of Ejike and Udo during interrogations after the accused was arrested. However, the investigating officer was not expected to launch full scale efforts to trace Ejike in Nigeria. As for Udo, the investigating officer explained that the accused did not provide further detailed particulars of Udo. As a result, the issue of incomplete investigation was baseless and had no benefit of doubt as claimed to be given to the accused. (paras 47 & 48)

(4) The accused had successfully raised a reasonable doubt in respect of his knowledge of the existence of the said drugs inside the four packages which were non-transparent and could not be seen by the naked eyes. On the balance of probabilities, the accused had succeeded in rebutting the presumption of trafficking under s. 37(da)(xvi) of the Act. As a result, it was unsafe to convict the accused of the offence as charged. (paras 51 & 52)

(5) It was inappropriate to allow an amendment to a charge of possession of the said drugs since on the same evidence, the accused was found to have no knowledge of the existence of the drugs in the bag he was carrying or had custody or control. Further, there was no *mens rea* possession since the accused did not have knowledge and therefore,

there could not be any offence at all. The accused had also raised a reasonable doubt as to the possession of the said drugs. Based on the totality of the evidence presented, the prosecution had failed to prove its case beyond reasonable doubt for the offence of trafficking or possession of the said drugs against the accused. (para 52)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Basil Omar v. PP [2002] 4 CLJ 418 CA ***(refd)***
Hoh Bon Tong v. PP [2010] 5 CLJ 240 CA ***(dist)***
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 SC ***(refd)***
Loh Kah Loon v. PP [2011] 5 CLJ 345 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Modjtaba Hosseinzadeh Majid v. PP & Another Appeal [2015] 1 LNS 434 CA ***(refd)***
Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC ***(refd)***
Paul Anayo Madubugwu v. PP [2015] 1 LNS 431 CA ***(dist)***
PP v. Hairul Din Zainal Abidin [2001] 6 CLJ 480 HC ***(refd)***
PP v. Herlina Purnama Sari [2016] 1 LNS 6 CA ***(refd)***
PP v. Lam San [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Teh Hock Leong v. PP [2010] 1 MLJ 741 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(da)(xvi), 39B(1)(a), First Schedule

For the prosecution - Iswa Tonie; DPP
For the accused - Chen Woon Yong; M/s Chen Woon Yong & Co

Reported by Kumitha Abd Majid

JUDGMENT

Zulkifli Bakar J:

Introduction

[1] The accused was charged and tried as follows:

> That you on 23rd September 2013 at about 3.00 pm at the Luggage Collection area at International Arrival Hall, Level 3, MTB, KLIA, in the district of Sepang, in the state of Selangor, did traffic in a dangerous drug, *to wit*, 837.9 gram Methamphetamine and you thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under section 39B(2) of the same Act.

[2] The accused claimed trial.

Case For The Prosecution

[3] In this trial, the prosecution had called six witnesses as follows:

(i) PW1: Photographer;

(ii) PW2: Storekeeper;

A (iii) PW3: Chemist for DNA;

(iv) PW4: Raiding officer;

(v) PW5: Chemist for drug exhibits; and

(vi) PW6: Investigation officer

B

[4] It is undisputed and unchallenged evidence for the prosecution that, on 23 September 2013 at around 3pm, PW4 was monitoring at the arrival hall, level 3, KLIA and he stopped the accused for inspection. PW4 directed the accused to put his luggage bag brand "Adidas" into the scanning machine but found no suspicious image.

C

[5] PW4 further instructed the accused to bring his luggage bag to the narcotic office at the same level for detailed inspection. While inside the office room, PW4 had conducted body search of the accused but nothing incriminating was discovered.

D **[6]** Further inspection was also made to the accused's black sling bag and it was only discovered clothes and no incriminating item was found. Subsequently, the luggage bag brand "Adidas" (P40) was inspected. After opening the said "Adidas" baggage, PW4 found eight packages of macaroni placed on top of the clothes.

E **[7]** PW4 took out all the packages and examined them. PW4 observed that the weight of each package was different and he became suspicious. Hence, PW4 opened each and every package.

[8] As a result, PW4 found that four packages contained macaroni while the other four packages each to contain one transparent plastic bag containing crystalline substances respectively (P49(1-4)). All the said eight packages were seized as exhibits in this case.

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[9] On the same day at around 7pm, the accused together with the eight packages were handed over to Inspector Eddy Amin (PW6) by PW4.

G **[10]** After receiving the exhibits, PW6 kept them inside a cabinet which is only accessible by him. On 25 September 2013, PW6 submitted all the exhibits to PW5 at Chemistry Department for analysis. Thus far there is no break in chain of evidence in respect of the drugs.

H **Findings At The Close Of The Prosecution's Case**

The Drugs (P49(1-4)) – Methamphetamine

[11] The chemist (PW5) confirmed that the incriminating substances inside the transparent plastic bags received by him and after analysis were 837.9g of methamphetamine which is a dangerous drug listed in the First Schedule

I of the Dangerous Drugs Act 1952.

[12] The defence challenged PW5's evidence that there was material discrepancy in relation to the representative samples taken by him for analysis in this case. The defence submitted that PW5 had said that he took five representative samples for analysis but during cross-examination, PW5 testified that he took 20 representative samples for analysis. The defence further argued that there was insufficient evidence showing that PW5 had followed the standard operation procedure issued by the Chemistry Department based on the united nation manual.

[13] The prosecution submitted and I agree with the prosecution that there was no material discrepancy as claimed by the defence. PW5 had explained earlier that he had taken the representative samples from each package totalling 20 samples, which can be seen as follows during cross-examination:

PB : Tapi doktor menyatakan disini 5 sampel sahaja.

SP5 : Maksud saya, saya mengambil 5 sampel perwakilan daripada 1 peket plastik tersebut iaitu E1. 5 sampel perwakilan untuk E2. 5 sampel bagi perwakilan untuk E3. 5 sampel perwakilan untuk E4.

[14] The court, as an impartial decision maker, is duty bound to clarify if necessary during the proceeding to preserve the right of the accused to be heard fairly and for public interest. This court has directed the question to the PW5 for clarification as follows:

Mah : Kita Homogen buka empat-empat campur semua ataupun kita homogen satu persatu?

SP5 : Dia berhomogen berasingan Yang Arif.

: Saya homogenkan setiap plastik E1 hingga E4 masing-masing dan ambil 5 sampel perwakilan daripada E1 hingga E4 masing-masing.

[15] This court accepts the evidence of PW5 as there was no issue of mishandling or irregularity in the process of analysis and what PW5 had done was in compliance with the law.

[16] The prosecution had also correctly pointed to this court through PW5 who had testified as follows:

TPR : Bagaimana doktor pastikan barang-barang kes ini tidak bercampur dengan barang-barang kes untuk kes lain?

SP5 : Saya telah melekat nombor makmal iaitu 13FRB13108 pada kotak pada kesemua plastik. Lepas itu saya juga telah menanda nombor makmal tersebut di dalam peket plastik Kimia Malaysia semasa bahan kristal tersebut dihomogenkan Yang Arif bila baki dipulangkan.

[17] The prosecution submitted that the procedures undertaken by PW5 were correct and had followed its standard operation procedure fixed by his department.

[18] As there is no reasonable reason to disbelieve his evidence, this court decided to accept the evidence of PW5 on its face value and this court is guided by the case of *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151; [1994] 1 MLJ 265, where it was held:

> ... 'We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert on its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.'
>
> Two things are implicit in that passage. *First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as prima facie evidence. Secondly, so long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory.* (emphasis added)

[19] Upon analysis by PW5, as stated in his report (P22), the crystalline substances in the four transparent plastic bags were confirmed to be methamphetamine of totalling 837.9g where each package contained:

(i) P49(1) contained 225.5g of methamphetamine;

(ii) P49(2) contained 234.6g of methamphetamine;

(iii) P49(3) contained 190.1g of methamphetamine; and

(iv) P49(4) contained 187.7g of methamphetamine.

[20] The evidence of PW5 is accepted as a part of *prima facie* evidence of the prosecution and there is no necessity for PW5 to show the laboratory procedures in detail because his evidence is not inherently incredible to be believed, as stated in *PP v. Lam San* [1991] 3 CLJ 2410; [1991] 1 CLJ (Rep) 391; [1991] 3 MLJ 426:

> (1) In regard to the evidence of the chemist, **unless the evidence is so inherently incredible that no reasonable person can believe it to be true, it should be accepted as *prima facie* evidence.** As long as the evidence is credible, there is no necessity for the chemist to show in detail what he did in his laboratory. **The evidence of the chemist in this case was more than sufficient as basis to call for the defence, granted that all the other ingredients of the offence had been successfully proved.** (emphasis added)

[21] This court also noted that the gross weight measured by PW4 initially was 1,120g which is different from the net weight stated by PW5 but this does not affect the credible evidence of the chemist as there is no break in the chain of evidence in respect of the identity of the drugs in this case. In *Loh Kah Loon v. PP* [2011] 5 CLJ 345; [2011] 4 MLJ 260, it was decided by the Federal Court as follows:

> [17] It can be seen from the above that **there was no break in the chain of evidence regarding the exhibits. The identity of the exhibits was well established**. Thus, on the facts of this case, **the difference in the weight of the exhibits as found by the police and the chemist, by itself cannot be said to have created doubt as to the identity of the exhibits**. The real question is whether the exhibits recovered by the police is the same exhibits sent to and examined by the chemist and subsequently produced in court as evidence. We have no doubt that it was the same exhibits. (emphasis added)

[22] In respect of the drugs, it is correctly specified in the charge and this court ruled that they are methamphetamine weighing 837.9g which is a dangerous drug as defined under s. 2 as listed in the First Schedule of the Dangerous Drugs Act 1952 (Act 234). This court also ruled that there is no break in the chain of evidence in respect of the drugs which were seized from the accused, sent for analysis by the chemist, returned to the police and produced at this trial.

Mens Rea Possession Of The Methamphetamine

[23] The prosecution submitted that there is direct evidence to prove the accused had custody and control of the "Adidas" bag (P40) which contained the drugs.

[24] The obvious metaphor from the current facts is that the manner in which the said drugs were concealed and carried. Possession to the "Adidas" bag (P40) physically which was unlocked, could attract an inference that the accused knew and consciously aware of such condition and could access to the contents inside the said bag at anytime as he wishes. It is a wilfully blind defence to argue that the accused was never curious to the difference in weight while holding the packages of macaroni, so said by the prosecution.

[25] This court agreed and thus the accused was proven by the prosecution to have the physical element and mental element (either direct or presumed) as to the existence of drugs inside the "Adidas" bag (see *Basil Omar v. PP* [2002] 4 CLJ 418; [2003] 1 MLJ 192) after this court had considered other factors as well, as follows:

(i) the DNA analysis onto the clothes inside the bag (P40) by PW3 had indicated that the shorts (P42) belongs to the accused and another male contributor while the singlet (P43) was belonged to the accused and two other male contributors;

(ii) this court is mindful that other than the accused there were DNA profiles of others were found on P42 and P43 but for this reason *per se* it is insufficient to say that other people could have access to the bag (P40). There is possibility that before P42 and P43 were kept in the bag, they were worn by the others; and

(iii) hence, this court had addressed its mind to the clothing and the drugs which were discovered in the bag (P40) in which the accused had physical control and custody over them. P42 and P43 were clearly shown belonging to the accused where it means the accused had full access to his belongings inside the bag (P40) which he carried into Malaysia.

[26] This court also referred to the Court of Appeal's decision in *PP v. Herlina Purnama Sari* [2016] 1 LNS 6; [2016] 2 MLJ 724 where it was held:

> [13] Relying on *Gunalan a/l Ramachandran & Ors v. Public Prosecutor* [2004] 4 MLJ 489 and *Parlan bin Dadeh v. Public Prosecutor* [2008] 6 MLJ 19, the learned judge correctly stated that *knowledge of the drugs could be inferred from the surrounding circumstances of the case. Considering the evidence as regards the manner in which the drugs were concealed and carried, such evidence had raised an inference that the respondent knew and was consciously aware about the existence of the drugs hidden in her luggage bag.* (emphasis added)

Trafficking Of The Methamphetamine

[27] After proving the accused had possession of the "Adidas" bag and its contents, this court had addressed its mind to the issue of "trafficking" of the dangerous drugs as stated in s. 2 of the Dangerous Drugs Act 1952:

> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, **carrying**, sending, delivering, procuring, supplying or distributing **any dangerous drug** otherwise than under the authority of this Act or the regulations made under the Act. (emphasis added)

[28] At this stage, the prosecution had established to this court that the accused had expressly committed an overt act that goes beyond a mere passive possession of the drugs which were found inside the bag (P40) because the accused was carrying the drugs hidden in the packages placed in the bag (P40) when stopped by PW4 for inspection on the fateful day. This court relied on the case of *PP v. Hairul Din Zainal Abidin* [2001] 6 CLJ 480; [2001] 6 MLJ 146 where Augustine Paul J (as he then was) said:

> This rule is particularly significant in a penal provision that attracts the death penalty as in this case. Thus, *in order for any other act to come within the definition in s. 2 of the Act it must be limited to the context of the scope of the acts enumerated in the definition section, that is to say, it must relate to an overt act which goes beyond passive possession*. The 'holding' of dangerous drugs as in this case can therefore constitute 'trafficking' within the meaning of s. 2 in one of two ways. **The act of 'holding' the dangerous drugs** must either be an act which goes beyond passive possession so as to constitute an additional act of trafficking under s. 2 of the Act or **it must fall within the meaning of 'carrying' or 'keeping' as specified in the section**. This requires a consideration of the meaning of the words 'hold', 'carry' and 'keep'. The *Websters' New World Dictionary* (3rd Ed) defines the words as follows:

> Hold: to take and keep with the hands or arms, or by other means; grasp; clutch; seize
>
> Keep: to take care of, or have and take care or charge of; specif.; (a) to protect; guard; defend (b) to look after; watch over; tend
>
> **Carry: to hold or support while moving; to take from one place to another**; transport, as in a vehicle; to hold, and direct the motion of; be a motion for; convey. (emphasis added)

[29] This court found the proposition of the defence counsel at the close of the prosecution's case that the accused was an innocent carrier at that material time is unacceptable as it sounds artificial and insufficient to convince this court simply because the accused had never opened the plastic package and his contemporaneous conduct of not running away when detained by police (PW4). Based on the case of *Teh Hock Leong v. PP* [2010] 1 MLJ 741, it has been held that:

> Held, dismissing the appeal:
>
> (1) The appellant was confronted by the police at the arrival gate which is a tight and restricted area with hardly any room for the appellant to make a successful escape. The appellant's chances of a quick getaway were minimal since he was escorted and was within the restricted vicinity of the KLIA building. Any attempt by the appellant to throw away or disassociate himself with the backpack would have been evidently noticeable. Further, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. **Therefore, the appellant's docile conduct throughout the period did not infer an absence of knowledge of the drugs** (see para 5). (emphasis added)

[30] Therefore, the normal conduct of the accused during the arrest at the airport is no longer to be given the benefit for the defence since such conduct could not definitely infer that the accused did not have the knowledge about the drugs inside the bag. The accused knew very well not to attempt escape when arrested because KLIA is an area with tight security and difficult to escape from arrest by the authority.

[31] Apart from establishing that the accused had *mens rea* possession of the drugs, the prosecution had also relied on s. 37(da)(xvi) of the Dangerous Drugs Act 1952 against the accused to trigger the presumption that the accused had trafficked the said drugs into Malaysia (where the minimum weight ascribed in the section is 50g). This court found that the prosecution had successfully shown that the quantity involved in this case is greater than any possibility for own consumption (see *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64) and the accused is presumed to be trafficking the said drugs found in his possession.

A **Consistency Between Prosecution's Exhibit With The Accused's Cautioned Statement (D68)**

[32] The defence counsel also contended that the accused's cautioned statement (D68) is consistent with his membership card issued by Fairly Used & New Motorcycle Dealers Association (FUNMDA) (P54) which is
B produced by the prosecution.

[33] This court, at this stage; ruled the cautioned statement (D68) however consistent with the prosecution's evidence cannot be used to raise reasonable doubt as to the possession of the drugs in the bag (P40) or rebut the presumption of trafficking of the said drugs. However, the production of the
C cautioned statement (D68) by the defence at this stage is useful for the defence to avoid contention of afterthought at a later stage.

***Prima Facie* Case**

[34] At the close of prosecution's case, this court had subjected the
D evidences of the prosecution to a maximum evaluation and found that the prosecution had established a *prima facie* case against the accused.

[35] The prosecution had successfully proven to this court to believe the facts as laid down is so probable that it did happen and it is only can be rebutted by evidence of the defence. If unrebutted, the evidence adduced by
E the prosecution thus far will satisfy this court to hand down a conviction on the charge (see *Balachandran v. PP* [2005] 1 CLJ 85; *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 MLJ 65).

[36] Applying the principle laid down in *PP v. Mohd Radzi Abu Bakar* [2006]
F 1 CLJ 457; [2005] 6 MLJ 393, this court ought to call for defence since a *prima facie* case had been made out. The guidance of *Mohd Radzi*'s case (*supra*) is followed and reproduced for ease of reference:

> For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:
>
> G (i) the close of the prosecution's case, **subject the evidence led by the prosecution in its totality to a maximum evaluation**. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
>
> H (ii) ask yourself the question: *If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called*. If the answer is 'No' then, a *prima facie* case has not been made out and the
> I accused should be acquitted;
>
> (iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. Public Prosecutor* [1963] MLJ 263. (emphasis added)

[37] As such, this court called the accused to enter his defence and the accused was given three alternatives of the method to provide his defence. After consulting his counsel, the accused elected to give evidence under oath in his defence.

The Defence

[38] In brief, the defence's story is summarised as follows:

(i) the accused said that he came to Malaysia to survey motorcycle spare parts market and to buy motorcycle spare parts because he was in fact involved in a motorcycle spare parts business at his shop in Nkwo, Nigeria since year 2000;

(ii) the accused stated to the court that he had a friend whose name is Ejike Chukwuebuka ("Ejike"). Ejike told the accused that his elder brother named Udo Chukwuebuka ("Udo") was also involved in motorcycle business in Malaysia and could assist the accused in surveying the motorcycle spare parts market in Malaysia;

(iii) the accused further explained that, what was told by Ejike had encouraged him to come to buy motorcycle spare parts in Malaysia as they could be obtained at cheaper price and this could be done through Udo;

(iv) the accused also testified that he was a member of a Motorcycle Dealers Association in Nigeria which is known as FUNMDA since year 2000, as supported by P54;

(v) on 21 September 2013 at around 7am, at the bus station at Nkwo, Nigeria, Ejike had handed over the bag (P40) to the accused. The accused testified that he did open the said bag and only saw some personal stuffs, *inter alia*, clothes and red colour plastic packages printed with words "GOLDEN PENNY ELICHE" containing macaroni ((P50(1-8)). Without any suspicion and upon trust towards a friend (Ejike), the accused brought the bag (P40) and boarded the bus to Lagos Airport; and

(vi) the accused was an innocent carrier since the plastic packages "GOLDEN PENNY ELICHE" containing macaroni were not visible to the naked eyes as to what were inside them.

Findings At The Close Of Defence's Case

[39] This court has considered the defence's evidences adequately and carefully to see whether the defence has rebutted the statutory presumption of trafficking and cast a reasonable doubt on the prosecution's case or raise

any doubt to the evidence of the prosecution in any manner. In doing so, this court had re-evaluated the prosecution's evidence in the light of the defence evidence.

Defence Of Innocent Carrier

[40] This court gave benefit of the doubt to the defence as to the purpose of the accused coming to Malaysia since evidence could show that the accused possibly came to buy motorcycle spare parts and to return to his country for his business as soon as possible as supported by the evidences that:

(i) the accused's identity card or membership card issued by FUNMDA;

(ii) the accused had with him a substantial sum of USD3,900 to be spent to buy motorcycle spare parts;

(iii) e-ticket receipt (P30(2)) to leave Malaysia on 30 September 2013 and the hotel booking (P31); and

(iv) not disputed facts that Kuala Lumpur, Malaysia is a hub for motorcycle spare parts.

[41] It was the defence of the accused that he was bringing the bag (P40) for Ejike to be given to Udo (Ejike's brother) in Malaysia. The bag (P40) contained Udo's clothing and eight packages of macaroni. The accused placed his clothing from a plastic bag carried by him earlier because there is still empty space in the bag (P40). The accused then threw away the empty plastic bag. His sling bag was already full with some clothes and his other personal belongings. The accused claimed himself was a mere innocent carrier of the bag (P40) containing the drugs.

[42] The prosecution submitted that by the way of the evidence adduced by the accused, the defence of innocent carrier would not be available to the accused because it was his own "wilful blindness" to deliberately shut his eyes to the obvious. The accused should be curious and alert and be wary of what he was bringing from his country to this country or other countries. There had been cases decided from facts of this nature:

(i) the closest example to the current facts can be seen in the case of *Paul Anayo Madubugwu v. PP* [2015] 1 LNS 431 where the Court of Appeal held that the accused should have every reason to suspect when given three heavy cylinders to be carried but he did not examine them even he had the chance and opportunity to do so;

(ii) also, the accused's wilful blindness would not support this kind of defence as decided in *Hoh Bon Tong v. PP* [2010] 5 CLJ 240. In *Hoh Bon Tong* (*supra*), it was said:

[73] **The defence of innocent carrier must necessarily bring into the picture the concept of wilful blindness**. And according to *Yong Pung How CJ (Singapore) in Public Prosecutor v. Hla Win* (*supra*) at p. 438, "the concept of wilful blindness qualifies the requirement of knowledge." And his Lordship continued further by saying (at the same page):

As Professor Glanville Williams aptly remarked in his *Textbook on Criminal Law*, at p. 125:

> ... the strict requirement of knowledge is qualified by the doctrine of wilful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truths is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know'.

[74] Continuing at the same page, his Lordship said:

> In *Ubaka v. PP* [1995] 1 SLR 267, the principles laid down in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356; [1968] 2 WLR 1303 and modified in *Tan Ah Tee v. PP* [1978] 1 LNS 193; [1980] 1 MLJ 49 were applied by the trial judge. In its grounds of judgment, this court quoted the following passage by the trial judge:
>
> > **Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance *simpliciter* is not enough.**

[75] **Here, we have evidence that the drugs were placed inside transparent plastic packets and the contents can be seen from outside**. It was mere folly on the part of the accused not to examine what he carried in his pockets. It is a classic case of wilful blindness. (emphasis added)

[43] However, as a matter of common sense, this court examined the photos (P10(6-7)) and inspected the eight packages where it was abundantly clear that the packages were not transparent for the contents to be visible. The court found that the learned Deputy Public Prosecutor had misled this court in submitting that the packages were half coloured and half transparent. After inspecting the packages, this court found that the defence of innocent carrier becomes probable in the circumstances of this case and could be distinguished from facts in the cases of *Paul Anayo Madubugwu and Hoh Bon Tong* (*supra*).

[44] Reconsidering the evidence of PW4, PW4 said he was suspicious about the packages due to their weights. PW4 did not describe the packages to be half visible of their contents. It is unfair to equate the accused with PW4 because PW4 is a well trained and experienced enforcement officer with necessary skills whilst the accused was just a layman without the same skills and experience as possessed by PW4.

[45] In my considered judgment, after perusal of the evidences available before me, this court found that accused's defence that he was an innocent carrier may well be possible. This court accepted the accused's defence of an innocent carrier as the accused would not know the incriminating substances were placed inside the sealed packages as their contents could not be seen from outside. Therefore, the accused after having inspected them could not have known what were inside them except as told and believed to contain macaroni and this court found that this is not a situation of wilful blindness on the part of the accused.

Incomplete Investigation Of PW6

[46] The defence argued that the investigating officer "did not lift a finger" to investigate the two persons namely "Ejike" and "Udo" hence the inference most favourable to the accused should be drawn.

[47] Undoubtedly, the accused in this case had given the name of the person who had allegedly passed the bag (P40) to him and name of the person for him to pass the bag (P40). The investigating officer should have taken some steps to investigate. The investigating officer could have obtained the details of Ejike and Udo during interrogations after the arrest of the accused. If the accused did not supply with further details of particulars of the persons than only the investigating officer could not be blamed. This court agreed with Abang Iskandar Abang Hashim JCA in the case of *Modjtaba Hosseinzadeh Majid v. PP & Another Appeal* [2015] 1 LNS 434 as follows:

> [24] At the end of this exercise, the learned trial judge had come to the conclusion that Abu Dzal was a fictitious person, conveniently created by both the appellants as an afterthought. It was indeed incredible, as was found by the learned trial Judge that *neither one of the appellants was able to furnish the full name and the basic full particulars of Abu Dzal to the Investigating Officer. Abu Dzal was supposed to have stayed on the same street as the Appellants in Tehran in Iran, and yet they expected the Investigating Officer to launch a full scale investigations into tracing the so-called Abu Dzal in Iran* ... (emphasis added)

As for Ejike, this court did not expect the investigating officer (PW6) to launch full scale efforts to trace him in Nigeria.

[48] As for Udo, the accused claimed that "Udo" had waited for him at the airport. Had PW4 waited a little while longer, the said "Udo" could have been arrested. That is if what the accused said is true. But this court must not decide on conjectures, as in this case the facts showed the accused was arrested alone. Be that as it may, in this case, PW6 explained that the accused did not provide with further detail particulars of Udo and he could not conduct further investigations to trace Udo. I accept this explanation. Hence, I ruled on the issue of incomplete investigation on this point is baseless and has no benefit of doubt as claimed to be given to the accused.

[49] The decision arrived by this court is not based on the ground of failure to trace "Ejike" and "Udo" but for other reasons as stated earlier and as further stated below.

Consistency Between Accused's Evidence In The Court With The Accused's Cautioned Statement (D68)

[50] This court also noted that the accused's testimony in the court is consistent with his cautioned statement (D68) which had strengthened his defence's case to invite this court to believe in the accused's story. This court took the steps to consider the evidences of the defence as a whole including the contents of the cautioned statements and re-evaluate the evidences of the prosecution as a whole and on the totality of the evidence presented, this court concluded as below.

Conclusion

[51] After assessing all the evidences available before the court in totality, the accused had successfully raised a reasonable doubt in respect of his knowledge of the existence of the said drugs inside the four packages which are "non-transparent" and could not be seen by naked eyes. After hearing the defence and considered it in the totality of the prosecution's evidences, this court found on the balance of probabilities the accused had succeeded in rebutting the presumption of trafficking under s. 37(da)(xvi) of the Dangerous Drugs Act 1952. This court followed the principle laid in *Mat v. PP* [1963] 1 LNS 82; [1963] 1 MLJ 263 as follows:

> (e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt ... Acquit.

[52] For the foregoing reasons, this court found it is unsafe to convict accused of the offence as charged. Hence, this court decided to acquit and discharge the accused from the said charge of drugs trafficking offence. Further, this court also found that it is inappropriate to allow an amendment to a charge of possession of the said drugs because on the same evidence this court have decided that the accused had no knowledge of the existence of the drugs in the bag (P40) he was carrying or having custody or control. There is no "*mens rea*" possession due to no knowledge therefore there cannot be any offence at all. This court found that the accused had also raised a reasonable doubt as to the possession of the said drugs. From the totality of the evidence presented to this court, I found that the prosecution had failed to prove its case beyond reasonable doubt for the offence of trafficking or possession of the said drugs against the accused in this case.